JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR CERTIORARI FILED DECEMBER 3, 1976
CERTIORARI GRANTED JANUARY 25, 1977

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RELEVANT DOCKET ENTRIES

		Date
1.	Accusation filed	September 14, 1974
2.	Trial commenced	May 22, 1975
3.	Judgment of conviction entered	May 28, 1975
4.	Amended Motion for New Trial filed	September 3, 1975
5.	Amended Motion for New Trial denied	September 29, 1975
6.	Notice of Appeal filed	October 29, 1975
7.	Case docketed in Ga. Court of Appeals	November 26, 1975
8.	Oral Argument held in Ga. Court of Appeals	February 4, 1976
9.	Conviction affirmed in Ga. Court of Appeals	April 6, 1976
10.	Petition for Rehearing filed	April 14, 1976
11.	Petition for Rehearing denied	May 6, 1976
12.	Petition for Certiorari filed in Ga. Supreme Court	June 4, 1976

13.	Certiorari denied in Ga. Supreme Court	July 9, 1976
14.	Justice Powell extends time for filing Petition for Writ of Certiorari to December 6, 1976	September 28, 1976
15.	Petition for Writ of Certiorari filed	December 3, 1976
16.	Response to Petition filed	December 30, 1976
17.	Certiorari granted	January 25,1977

ACCUSATION

IN THE CRIMINAL COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CASE NO. 133873
	)	
	)	
CLAUDE DAVIS BALLEW,	)	ACCUSATION
	)	
Defendant	)	

STATE OF GEORGIA, FULTON COUNTY

Came in person before me Charles R. Little who, being duly sworn, deposes and says on oath that from the best of his knowledge and belief Claude Davis Ballew is guilty of the offense of MISDEMEANOR, in that the said accused in the County of Fulton, on the 9th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-1201 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door" that contained obscene and indecent scenes, which materials considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, in a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein in an essential averment to this transaction. Contrary to Law.

Count #2: I, Charles R. Little in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew with the offense of Misdemeanor, for that the said accused in the County aforesaid, on the 27th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door", that contained obscene and indecent scenes, which material considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction. Contrary to Law.

Georgia, charge and accuse Claude Davis Ballew with the offense of MISDEMEANOR, for that the said accused in the County aforesaid, on the 9th day of November, 1973 did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door" that contained obscene and indecent scenes, which materials considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction. Contrary to Law.

Count #2: I, Charles R. Little in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew with the offense of Misdemeanor, for that the said accused in the County aforesaid, on the 27th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door", that contained obscene and indecent scenes, which material considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction. Contrary to Law.

JURY CHARGE

IN THE CRIMINAL COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CASE NO. 133873
	)	
	)	
CLAUDE DAVIS BALLEW,	)	
	)	
Defendant	)	

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY: This Accusation charges Claude Davis Ballew with the offense of a misdemeanor. The charge being that the said accused, in the County of Fulton, and State of Georgia, on the 9th day of November, 1973, did commit the offense of a misdemeanor, in that the offense of distributing obscene materials in violation of Georgia Code Section 26-2101, in that the said accused did, knowing the obscene nature thereof, distribute a motion picture film entitled, "Behind the Green Door." That contained obscene and indecent scenes, which material, considered as a whole and applying contemporary community standards, predominantly appeals to the prurient interest embodying – is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes shame – and goes substantially beyond customary limits of candor in describing or representing such matters. And said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value.

The date alleged herein is an essential averment to this transaction, contrary to law.

Now, I have just read to you, Ladies and Gentlemen of the Jury, Count One of this Accusation.

I will now read Count Two of this Accusation.

I, Charles R. Little, in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew, with the offense of a misdemeanor; for that the said accused, in the county aforesaid, on the 27th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101, in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," that contained obscene and indecent scenes, which material, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest; is a patently offensive, morbid – is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion. And goes substantially beyond customary limits of candor in describing or representing such matters, and said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction, contrary to law.

Now, to both Counts of this Accusation, Ladies and Gentlemen of the Jury, the defendant pleads, not guilty. And that forms the issue that you are to try in this case.

Now, I charge you, Ladies and Gentlemen of the Jury, that the defendant is presumed in law to be innocent of this charge, and that presumption remains with him throughout the trial, until and unless overcome by evidence sufficient to satisfy your minds beyond a reasonable doubt as to his guilt.

I charge you further, Ladies and Gentlemen of the Jury, that the burden is upon the State to remove this legal

presumption of innocence by proving the defendant guilty beyond a reasonable doubt.

Now, I charge you further, Ladies and Gentlemen of the Jury, that a reasonable doubt means just what it says. It is not a capricious or arbitrary doubt, nor a doubt which does not arise from a consideration of the evidence, but a doubt growing out of the evidence or from a lack of the evidence or from a conflict of the evidence. If, after considering all the facts and circumstances of the case, under all the evidence in the case, your minds are waivering, unsettled, unsatisfied, that is the doubt of the law, then you should acquit the defendant. But if that doubt does not exist as to the guilt of the defendant, then you should convict the defendant.

Now, I charge you further, Ladies and Gentlemen of the Jury, that you are made by law the exclusive judges as to the credibility of the witnesses in this case. Now, in passing upon their credibility you may consider all the facts and circumstances of the case. The witnesses manner of testifying; their intelligence; their interest or want of interest; their means and opportunity for knowing the facts to which they testified; the probability or improbability of their testimony, and also their personal credibility so far as the same may legitimately appear from the trial of the case.

Now, I charge you further, Ladies and Gentlemen of the Jury, that the law also directs you that it is your duty where it can be done to reconcile conflicting evidence if there be such evidence in this case, so all of the witnesses will be made to speak the truth, and perjury will be imputed to none of them. But if there be any evidence in this case in such irreconcilable conflict that this cannot be done, then it will be your duty to believe that evidence which is most reasonable and most credible to you under all of the circumstances and the evidence in the case.

Now, Ladies and Gentlemen of the Jury, I charge you further that freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of the

Constitutional Rights to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed freely and publicly so long as the expression does not fall within the area of obscenity. However, the Constitutional Right of free expression does not extend to the expression of that which is obscene.

Now, Ladies and Gentlemen of the Jury, I charge you further that the guarantee of the Constitution is not confined to the expression of ideas or emotions that are conventional or shared by the majority.

Now I also charge you further, Ladies and Gentlemen of the Jury, that a film is not obscene merely because it attractively depicts a relationship which is contrary to the religious or moral precepts of the community.

Now, Ladies and Gentlemen of the Jury, I charge you further, that if the predominant appeal of the motion picture film in question herein, taken as a whole, is an appeal to the normal interest in sex of the average person, the Jury should acquit the accused.

Now, Ladies and Gentlemen of the Jury, I charge you further, that a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise dissiminates to any person, any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent to do so, provided that he – the word, 'knowing,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable prudent man on notice as to the suspect nature of the material.

Ladies and Gentlemen of the Jury, the Court will correct itself in using the word here. The word was 'work' in the charge here. And I will correct that part of it. The word, 'word'. I mean, 'word.' I should have used, 'work.'

Now, then, 'B' of 26-2101: Material is obscene if considered as a whole, applying community standards, it's predominant appeal is to the prurient interest; that it is a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value. And if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

Now, I charge you further, Ladies and Gentlemen of the Jury, that the opinions of experts may be offered by either side on any question of science, skill trade or like question, and is admissible. And such opinions may be given on the facts as proved by other witnesses. And in this instance, on the facts as proved by the showing of the film.

The testimony of an expert who has been qualified as to his opinion of such is admissible if the opinion given relates to scientific or technical knowledge. The weight of such testimony, and whether it is applicable to the proved facts under investigation is a question for the Jury.

Now, Ladies and Gentlemen of the Jury, in weighing the evidence in a case, you may consider all the facts and circumstances of the case. The witnesses manner of testifying, their intelligence. Their means and opportunity of knowing the facts to which they testify. The nature of the facts to which they testify. The probability or improbability of their testimony. Their interest in the outcome of the case or their lack of interest in the outcome of the case. And also their personal credibility insofar as the same may legitimately appear upon the trial of the case. The weight and credit that the Jury will give to any person offered as an expert witness

is solely a matter for the Jury to determine. It is a matter for you to determine as to whether that the things that the person offered as an expert testified to, were in fact matters that were at issue in this case.

Now, Ladies and Gentlemen of the Jury, the Court charges you that in misdemeanor cases all who participate in the commission of the same criminal act, in the execution of the common intend, are legally contemplated to, or in legal contemplation equally guilty.

Now in misdemeanor offenses all who procure, compel, command, aid or abet in the commission of a misdemeanor are regarded by the law as a principle offender and may be accused as such either in an Accusation which jointly accuses all of those who participated in the offense or in separate act. Accusations against the various individuals who may be connected with the commission of the offense. Whether the Accusation is joint or several, any particular defendant accused in an Accusation of having committed a misdemeanor offense, may be convicted by proof either that he directed or personally committed the act, or that he procured, counseled, commanded, aided or abetted the criminal transaction of another who was the direct and immediate actor.

Now Number One, Ladies and Gentlemen of the Jury, the essential elements of the offense are: *First*, that the average person, not a sick person, not a highly trained person, not a professional person dealing with it, but an average man and woman in the community that constitutes the Community of Georgia, applying contemporary community standards, would find that the motion picture charged, taken as a whole, appeals to the prurient interest in sex.

Now, then, second: The motion picture charged herein is a patently, offensive description of sexual conduct embodying a shameful or morbid interest in nudity, sex or excretion.

Thirdly: That the motion picture we're trying here, taken as a whole, lack serious literary, artistic, political or scientific value.

And fourth: That the film is totally or utterly without redeeming social value.

Additionally, that the defendant did the act with knowledge, and the Court has charged you that knowledge should be the knowledge of a prudent person. Whether he knew it actually or should have known it, constructive knowledge, that a prudent person under the facts and circumstances as given by the witness here, should have known of the nature of the film being exhibit, that it was obscene and he intended to exhibit the film. You have to find beyond a reasonable doubt that he intended to exhibit the film or that he aided, counseled, abetted and participated in the exhibition of the film, or the intent to exhibit it with the knowledge of its content, with the knowledge that its contents were obscene within the definition of obscenity under Georgia law, or that he as a reasonable prudent man, considering the circumstances, should have known.

Now I charge you, Ladies and Gentlemen of the Jury, obscene material. And all of the circumstances surrounding the exhibition or the offering of the exhibition of the same. In this case, it is the film.

Now, in determining whether the material predominantly appeals to a shameful and morbid interest in sex, excretion or nudity, and whether the said material is patently offensive because it goes substantially beyond the customary limits of candor in describing or representing certain matters, you must consider what, by a general co-census of the Community of Georgia as a whole, would be offensive to the common instincts of decency or people generally.

Now the Court charges you further, Ladies and Gentlemen of the Jury, that the burden is upon the State to establish beyond a reasonable doubt that the material alleged to be obscene by the State in this Accusation, must as a whole, appeal predominantly to the prurient interests in sex, excretion or nudity, that is to say, that the predominant appeal of such material is to a shameful or morbid interest in sex, excretion or nudity. And that the materials are patently offensive because they go substantially beyond the customary limits of candor in describing or representing such matters. And that the materials are utterly without social value. All of these elements must be present and united at the same time. They must coalesce and co-exist.

A motion picture is not obscene merely because it depicts relationships which are contrary to your religious precepts or the religious precepts of the community as a whole.

Now, Ladies and Gentlemen of the Jury, this Accusation against this defendant is not evidence of guilt, and carries no presumption of guilt. It is merely the contentions of the State, setting forth the elements of the offense with which the defendant is charged.

No writing or entry on this Accusation may be considered by you as evidence in this case. It will be out with you and you may refer to it in order only to determine what the issues are between the State and the defendant.

I charge you further, Ladies and Gentlemen of the Jury, that it is the duty of the jurors after the Charge of the Court had been submitted to you, and while you are deliberating, to discuss and consider the opinions of each other. But each one of you must decide this case upon your own individual opinion of the evidence and upon your own individual judgment and conscious.

In order to convict this defendant of the offenses with which he is charged, your verdict must be unanimous.

Now, Ladies and Gentlemen of the Jury, in giving you these instructions the Court does not undertake to intimate that the community as used in this statute which I have read to you, and in this Accusation on which this defendant is being tried, is that community or political entity which is the State of Georgia. In other words, the standard for obscenity under the law that this defendant is alleged to have violated, is gauged by the standards that prevail in the State of Georgia.

Now, I charge you further, Ladies and Gentlemen of the Jury, that the State is not required to introduce into evidence or to offer into evidence, witnesses to render an opinion as to whether this film is obscene or not obscene. The Jury is to make up their minds as to the obscenity of this picture within the definition of the Georgia law, based upon the evidence in the case. This film itself is sufficient for this Jury to make that determination.

Now, I charge you further Ladies and Gentlemen of the Jury, that in this connection what is obscene material is determined by the sensibilities and the moral standards of the people or community as a whole. And that is that the Community of Georgia as evolved from generation to generation along with our civilization. What is obscene in one period may not be obscene in another period of our civilization. Whether one commits a violation of the Georgia law as heretofore given you in this charge, depends upon the time, the place, the manner by which one exhibits or offers to do the same or otherwise disseminates the alleged nor express any opinion as to what has or what has not been proven in this case. The Court gives you these principles of law to guide you in considering the facts in the case, but the Court recognizes that it is in the province of the Jury to

make decisions as to all matters of fact. And the Court gladly and properly leaves to you, Ladies and Gentlemen of the Jury, the decision as to all matters of fact. I can only say to you again as I have said to you heretofore, that the issue in this case is formed by the charges made by this Accusation against this defendant. And this defendant's plea of not guilty thereto.

Now upon the issue thus formed you will take into consideration all of the evidence in the case. All of the facts and circumstances in the case. And in this manner you will ascertain for yourselves what the truth is with reference to this charge. And when you have reached a conclusion as to what the truth is, let it be expressed in the verdict which you return in this case.

Now, Ladies and Gentlemen of the Jury, if you believe beyond a reasonable doubt that the defendant, in the County of Fulton, and State of Georgia, at anytime within the two years immediately preceding the date of the swearing out of this Accusation, did, in the County of Fulton, and the State of Georgia, on the 9th day of November, 1973, and this is Count One, commit the offense of distributing obscene materials in violation of the Georgia Code Section 26-2101, in that the said accused did knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," that contained obscene and indecent scenes which materials considered as a whole and applying contemporary community standards, predominantly appeals to the prurient interest; is a patently offensive depiction and description of sexual conduct, embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters, and said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value, the date alleged herein is an essential averment to this transaction, contrary to law, and as charged in this Accusation, then and in that event you would be authorized to find the defendant guilty.

If you do not believe the defendant guilty, or if you should entertain a reasonable doubt as to his guilt, then you should acquit.

Now, Ladies and Gentlemen of the Jury, in Count Two, if you believe beyond a reasonable doubt that the defendant in the County of Fulton, and the State of Georgia, at anytime within the two years immediately preceding the date of the swearing out of this Accusation, did, on the 27th day of November, 1973, and I'll read Count Two to you now.

"I, Charles R. Little, in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew, with the offense of a misdemeanor, for that the said accused, in the county aforesaid, on the 27th day of November, 1973, commit the offense of distributing obscene materials in violation of the Georgia Code Section 26-2101, in that the said accused, did, knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," that contained obscene and indecent scenes, which material considered as a whole and applying contemporary community standards, predominantly appeals to the prurient interest; is a patently offensive depiction and description of sexual conduct, embodying a shameful or morbid interest in nudity, sex and excretion. And goes substantially beyond customary limits of candor in describing or representing such matters, and said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction; contrary to law, and as charged in this Accusation, then in that event you would be authorized to find the defendant guilty on Count Two.

If you do not believe the defendant guilty on Count Two, or if you entertain a reasonable doubt as to the defendant's guilt on Count Two, then you should acquit the defendant.

Now, Ladies and Gentlemen of the Jury, and this is a matter of illustration only. In case you convict the defendant in Count One, the form of your verdict would be, "We, the Jury, find the defendant, guilty, on Count one." In case you acquit the defendant the form of your verdict would be, "We, the Jury, find the defendant, not guilty, on Count One."

Now, Ladies and Gentlemen of the Jury, and this is still a matter of illustration only. And in case you convict the defendant in Count Two, the form of your verdict would be, "We, the Jury, find the defendant, guilty on Count Two." In case you acquit the defendant, Ladies and Gentlemen of the Jury, the form of your verdict would be, "We, the Jury, find the defendant, not guilty, on Count Two."

Now, Ladies and Gentlemen of the Jury, your verdict should be in writing on the back of this accusation, using the printed form at the bottom of the page.

It should be dated and signed by one your number as Foreman, and returned into open Court.

You may now retire, Ladies and Gentlemen of the Jury and consider your verdict.

Now, I will instruct you not to start considering your verdict till you hear from the Court.

OPINION OF THE GEORGIA COURT OF APPEALS

April 6, 1976

GEORGIA COURT OF APPEALS

51795. BALLEW (C.D.) v. THE STATE. W–33

WEBB, Judge.

Clause Ballew appeals his conviction on two counts of distributing obscene materials in violation of Criminal Code §26-2101. The conviction involved the exhibitions on November 9 and 26, 1973 at an Atlanta theatre of motion picture films entitled "Behind the Green Door." Ballew enumerates thirteen alleged errors, consolidated on argument into six issues.

1. The first is that the film is not obscene under applicable constitutional law. We were requested to make an independent appellate review of the film and make our own determination of obscenity *vel non.*

Our Constitution provides that both of our appellate courts are "for the trial and correction of errors of law . . ." Art. VI, Sec. II, Pars. IV and VIII (Code Ann. §§ 2-3704, 3708). There is no constitutional provision for an independent appellate determination of the weight of evidence, and it seems to have been well settled that the appellate court's review as to evidence is limited to its legal sufficiency, not its weight. *Proctor v. State,* 235 Ga. 720, 721 (221 S.E.2d 413); *Ridley v. State,* Ga. (SE.2d) (#30426, Feb. 2, 1976). Even so, our Supreme Court has made de novo independent reviews of movie films to decide the constitutional fact of obscenity without reference to the "trial and correction of errors of law" constitutional limitation. *Slaton v. Paris Adult Theatre I,* 231 Ga. 312, 318 (201 SE.2d

456, 413 U.S. 49, 93 SC 2628, 37 LE2d 446), *Dyke v. State*, 232 Ga. 817 (209 SE.2d 166) (cert. denied by U.S. Supreme Court April 28, 1975).

Our view has been that we are limited to a determination of whether there was sufficient evidence to support the jury's verdict. The Supreme Court of the United States held, however, that on appeal in an obscenity case the appellate court cannot merely decide whether there was sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such *vel non*. *Miller v. California*, 413 U.S. 15, 25 (93 SC 2607, 37 LE.2d 419); *Jenkins v. Georgia*, 418 U.S. 153, 160 (6) 164 (94 SC 2750, 41 LE.2d 642, 650, 652). That Court held that juries do not have unbridled discretion in determining what is patently offensive, and the jury's verdict does not preclude all further appellate review of an accused's assertion that his film was protected by the First and Fourteenth Amendments.

This issue of independent review had been invoked earlier in *Jacobellis v. Ohio*, 378 U.S. 184, 188 (84 SC 1676, 12 LE.2d 793, 798) wherein Mr. Justice Brennan stated: "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law [cit. omitted]. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' "

Mr. Justice Brennan also said that failure to independently review would be "an abnegation of judicial supervision . . . inconsistent with our duty to uphold the constitutional guarantee."

Our own Supreme Court stated in *Dyke v. State*, 232 Ga. 817, 821, supra: "We are not bound to approve the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity.

Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective supreme courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. Our purpose was two-fold; to determine if there was sufficient evidence to support the verdict; and, in accordance with the decisions of those courts cited hereinabove (which in our opinion exceed our constitutional appellate review limitation) to decide by an independent appellate review the constitutional fact of obscenity vel non. "[T]here comes a point where this Court should not be ignorant as judges of what we know as men."[1]

Section 26–2101(b) of the Criminal Code in effect at the time of the violations[2] provided: Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

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[1] Mr. Justice Frankfurther in *Watts v. Indiana*, 338 U.S. 49, 52, SC 93 LE 1801, 1805. See *Bryon v. Felker*, Ga. App. (SE) (No. 51675, decided Jan. 28, 1976).

[2] The law was amended in 1975 and broadens somewhat the definition of obscene materials. Ga. L. 1975, p. 498.

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation; cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "a public portrayal of hard core sexual conduct for its own sake, and [presumably] for the ensuing commercial gain." *Miller v. California,* 413 U.S. 15, 35 supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. *Miller v. California,* 413 U.S. 15, 23, supra; see also, *Liles v. Oregon,* 543 P.2d 698, 44 LW 3623 (cert. den. by United States Supreme Court May 3, 1976, 75-983).

2. Ballew's second contention is that the evidence was insufficient to support the verdict. We do not agree.

The film, obviously, is the best evidence of what it represents, and having been before the trial court no other affirmative evidence is necessary to determine its obscenity *vel non.* Examining the record and viewing a projection of the film, we conclude that the jury's determination that the picture was obscene was supported by the evidence. *Paris Adult Theatre I. v. Slaton,* 413 U.S. 49, 56, supra; *Hamling v. United States,* 418 U.S. 87, 100, 94 SC 2887, 41 LE.2d 590, 610. "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public

accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller v. California,* 413 U.S. 15, 25, supra.

Ballew asserts, however, that the evidence was insufficient to connect him, beyond a reasonable doubt, with the exhibition of this film, "Behind the Green Door." The theatre he managed was an "adult theatre, and the film was advertised on the marquee. He was present when the film was exhibited on the dates of his arrest. On at least one of the occasions involved herein he sold tickets, and pressed a button to allow entrance into the seating area. He checked the cash register and locked the door after each arrest.

In *Dyke v. Georgia,* 232 Ga. 817, 822, supra, "Appellant further argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the theatre was an 'adult theatre.' Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occasion, appellant sold tickets for admission to see it. This was sufficient for the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Code Ann. § 26-801."

We also reject Ballew's assertion that the evidence failed to prove guilty knowledge by him of the nature of the film. Under Criminal Code § 26-2101(a) "knowing" as used therein "shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." See *Dyke v. State,* at page 822, and cases cited.

3. The next argument is that the trial judge improperly instructed the jury as to the law so as to deny him his constitutional rights guaranteed by the First, Fifth and Fourteenth Amendments. An examination of the various charges complained of, however, reveals that they as a whole comport with Criminal Code §26-2101, and those approved in *Dyke v. State*, 232 Ga. 817, supra, and *Slaton v. Paris Adult Theatre I*, 231 Ga. 312 supra. One charge complained of was a quotation of the definition of obscene material as set forth in §26-2101. There is no merit in this complaint.

4. Error is charged on the Court's denial of Ballew's motion to suppress the motion picture film because the search warrants were issued upon affidavits allegedly insufficient to supply probable cause. This same contention was made in *Dyke v. Georgia*, 232 Ga. 817, 823, 824, supra. The affidavits upon which the two search warrants were issued herein contain rather accurate and full factual descriptions of representative scenes on the film, and were sufficient to show probable cause for issuance of the warrants.

5. Ballew contends his conviction on two counts in the accusation were but a single transaction and his conviction thereon violated his constitutional rights against double jeopardy as guaranteed by the Fifth Amendment and the Georgia Constitution. Interestingly, this same argument was made in *Dyke v. Georgia*, 232 Ga. 817, 827, supra, counsel for Ballew having been counsel for Dyke.

Here, the accused was first arrested for showing the film on November 9, and the film was seized under the search warrant. The accused waived commitment hearing. Subsequently, the accused was arrested on another warrant for showing the same picture, from another copy of the film, on November 26. The statement of Mr. Justice Ingram in the *Dyke* case (232 Ga. at pages 827, 828) is equally applicable here. "Appellant argues that the accusation charged him in

two counts of violating the same statute and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption in scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to 'pyramid' the charges and punishment against him . . . but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime." So it is in this case.

6. Lastly, appellant complains that he was denied his right to jury trial under the Sixth and Fourteenth Amendments by being tried before a five-person jury in the Criminal Court of Fulton County.

This contention was ruled upon in *Sanders v. State*, 234 Ga. 586 (216 SE.2d 838) (cert. denied by U.S. Supreme Court Feb. 23, 1976) wherein the Supreme Court said: "We reject this argument in view of Georgia authority to the contrary. See *McIntyre v. State*, 190 Ga. 872 (5) (11 SE.2d5). The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In *Williams v. Florida*, 399 U.S. 78, 92 (Fn. 28) it is observed: 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

We find no error and affirm the trial court. Deen, P.J., and Quillian, J., concur.

GEORGIA COURT OF APPEALS
DENIAL OF REHEARING

GEORGIA COURT OF APPEALS

May 6, 1976

51795. BALLEW (C.D.) V. THE STATE W-33

Please substitute the attached new page 7 for that previously furnished in the opinion rendered in the above case on April 6, 1976. The judgement is not affected and the motion for rehearing is denied.

GEORGIA SUPREME COURT
DENIAL OF WRIT OF CERTIORARI

CLERKS' OFFICE, SUPREME COURT OF GEORGIA

Atlanta July 9, 1976

Dear Sir;

Case No. 31362 *Claude Davis Ballew v. The State*

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

GEORGIA CONSTITUTION,
ARTICLE VI, SECTION XVI

Article VI, Section XVI of the Georgia Constitution (*Georgia Code Annotated* §2-5101) provides:

"The right of trial by jury except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."
